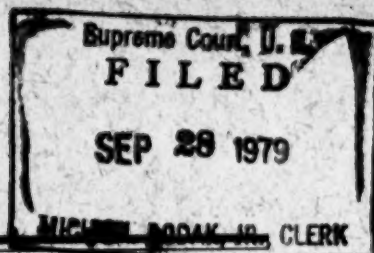


No. 79-233



**In the Supreme Court of the United States**

**OCTOBER TERM, 1978**

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**EUGENE W. WINES, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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**WADE H. MCCREE, JR.**  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner seeks review of the district court's reinstatement of an indictment it had previously dismissed in this criminal tax case.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on three counts of criminal tax evasion, in violation of 26 U.S.C. 7201 (R. 1).<sup>1</sup> The court of appeals reversed on the ground that the government had failed to make certain evidence available to petitioner at trial, in accordance with the requirements of 18 U.S.C. 3500 (the "Jencks Act"). Because the court of appeals held that the district court

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<sup>1</sup>"R." refers to the record filed in the court of appeals. "III-Tr." refers to the third volume of the transcript of the district court proceeding.

correctly reinstated the indictment after it had previously dismissed it at the same session of the court, it ruled that the district court retained jurisdiction over petitioner, and remanded the case for a new trial (Pet. App. 1a-10a). Petitioner seeks review of the ruling below with respect to the reinstatement of the indictment.

The pertinent facts may be summarized as follows: On March 30, 1977, a grand jury returned an indictment charging petitioner with three counts of tax evasion (R. 1). Prior to trial, petitioner moved to dismiss the indictment on the ground that improper evidence had been presented to the grand jury. Petitioner's motion was heard on the first day of trial (see III-Tr. 7-17). After preliminary argument on the motion, the prosecutor stated that there was a grand jury in session and that the case could be presented to that grand jury for a superseding indictment if petitioner so desired (III-Tr. 17-18). The district court then indicated that the prosecutor should seek a superseding indictment, thereby avoiding the necessity of ruling on petitioner's motion to dismiss (III-Tr. 19-21).

Later that day, the grand jury returned a superseding indictment. After reading the superseding indictment, petitioner's counsel asked if it could be assumed that the first indictment had been dismissed (III-Tr. 43). The district court then asked the prosecutor whether the government moved to dismiss the first indictment, and the prosecutor thereupon moved to dismiss the first indictment. In response to a question from the district court, petitioner's counsel stated that he had no objection to the dismissal of the first indictment; the district court thereupon dismissed the first indictment (*ibid.*).

Petitioner immediately moved to dismiss the superseding indictment (which charged the same offenses as the original indictment) on grounds that it was barred by the statute of limitations, that there was an indictment

outstanding against him at the time the superseding indictment was returned, and that the figures alleged in the superseding indictment as the tax liability due and owing were less than the figures alleged in the first indictment (III-Tr. 44-46).

After expressing surprise at petitioner's motion to dismiss the superseding indictment, the prosecutor stated that he would like to proceed on the first indictment and asked the district court to reconsider the dismissal of the first indictment (III-Tr. 47-48). The district court stated that the return of the superseding indictment had been sought in order to save time in resolving petitioner's problems with the first indictment and indicated its belief that petitioner had agreed to the procedure. Faced with an entirely new set of objections to the superseding indictment, the district court granted the government's motion to withdraw the motion to dismiss the first indictment, and proceeded to consider and reject petitioner's objections to the first indictment (III-Tr. 49).

1. Although the court of appeals reversed petitioner's convictions and remanded for a new trial, petitioner seeks review of its holding that the district court correctly reinstated the first indictment. There is, however, no need for this Court to resolve petitioner's claim at this time. If petitioner is acquitted at his new trial, his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by seeking review of the final judgment. See *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-258 (1916).

2. At all events, petitioner's claim is without merit. He contends (Pet. 8-11) that the district court had no jurisdiction or authority to reinstate the first indictment and that its action usurped the authority of the grand jury



to vote indictments. But all of the pertinent precedents support the view that the federal courts have inherent powers to control the litigation before them in these circumstances. Here, the court dismissed the indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, which provides that [t]he Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate." As the court of appeals recognized (Pet. App. 3a), Rule 48 is based on the *nolle prosequi* of common law. See Notes of the Advisory Committee on Rules accompanying Rule 48, 18 U.S.C.A.

The reinstatement of the indictment was therefore within the power of the court. At common law, a court could reinstate an indictment in the same term in which it had been *nolle prossed* by the prosecutor. See *United States v. Rossi*, 39 F. 2d 432, 433 (9th Cir. 1930); *People v. Curtis*, 113 Cal. 68, 69-71, 45 P. 180, 181 (1896); *State v. Lonon*, 331 Mo. 591, 596-597, 56 S.W. 2d 378, 381 (1932); *Commonwealth v. McLaughlin*, 293 Pa. 218, 223, 142 A. 213, 216 (1928). See also 112 A.L.R. 386, 388-389 (1938). Nothing in Rule 48(a) suggests any intent to change this aspect of the common law. Indeed, the court reinstated the indictment in this case minutes after it was dismissed.

Moreover, as this Court has recognized (*United States v. Benz*, 282 U.S. 304, 306-307 (1931)):

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court \* \* \*. The rule is not confined to civil cases, but applies in criminal cases as well \* \* \*.

See also *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 167 (1873); *Goddard v. Ordway*, 101 U.S. 745, 752 (1879). These inherent powers, which have been held to include the power to reinstate any cause dismissed by mistake (see *The Palmyra*, 25 U.S. (12 Wheat.) 1, 9-10 (1827); *O'Neal v. United States*, 272 F. 2d 412, 413-414 (5th Cir. 1959)), also properly include the power to reinstate, on the same day it is dismissed, an indictment *nolle prossed* by the prosecutor prior to trial with leave of the court.

Since petitioner was not prejudiced in any way by the trial court's action, which was a consequence of his own pretrial maneuvering, the decision below correctly upheld the district court's reinstatement of the indictment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
Solicitor General

SEPTEMBER 1979